

(b) (6) AGR 80TH TNG CMD SJA

From: (b) (6) USAR 80TH TNG CMD
Sent: Friday, June 03, 2011 8:06 PM
To: (b) (6) @mail.us.army.mil; (b) (6) USAR 80TH TNG CMD; (b) (6)
(b) (6) AGR 80TH TNG CMD SJA
Cc: 'karen.ledoux@mail.us.army.mil'
Subject: Fw: (b) (6) Proposed Counseling Statement
Attachments: TDS Memo, (b) (6) 03Jun11.pdf

(b) (6)

Just received this and fwding to my Ako. I will review in am when I am at drill tomorrow (Sat only). Please review and contact me tomorrow (Sat) so I can reply accordingly. I do not particularly like getting e-mails from Yahoo and AOL accounts from people representing that they are in the military. It does not seem to be proper military etiquette. Send me an e-mail when you are available. My civilian cell is (b) (6)

(b) (6)

From: (b) (6) @aol.com [mailto:(b) (6) @aol.com]
Sent: Friday, June 03, 2011 07:47 PM
To: (b) (6) USAR 80TH TNG CMD
Cc: (b) (6) .com (b) (6) .com>; (b) (6) @yahoo.com (b) (6) @yahoo.com>
Subject: (b) (6) Proposed Counseling Statement

(b) (6)

Sir:

As you are aware, (b) (6) is the subject of an ongoing investigation conducted UP AR 15-6. Please be advised that I, together with (b) (6) have been detailed to represent (b) (6) as military counsel. (b) (6) is also represented by civilian, counsel (b) (6) Esq., who is also copied here.

It is our understanding that it is the command's intention to present (b) (6) with a counseling statement during the weekend of 4 June 2011. We have reviewed the proposed counseling statement. On behalf of (b) (6) we submit the attached memorandum. I am also available for a telephone conference at your convenience.

Respectfully submitted,
(b) (6)
(b) (6) JA
Trial Defense Service

THIS CORRESPONDENCE IS PROTECTED UNDER THE ATTORNEY-CLIENT PRIVILEGE AND IS CONFIDENTIAL

(b) (6) AGR 80TH TNG CMD SJA

From: (b) (6) USAR 80TH TNG CMD
Sent: Monday, May 23, 2011 10:08 AM
To: (b) (6) AGR 80TH TNG CMD SJA; LeDoux, Karen E BG RES 94TH DIV FS
CMDGRP
Cc: (b) (6) @aol.com; (b) (6) USAR 80TH TNG CMD
Subject: Re: Policy comments (UNCLASSIFIED)

Thank you (b) (6)
I will review.

(b) (6)
----- Original Message -----
From: (b) (6) AGR 80TH TNG CMD SJA
Sent: Monday, May 23, 2011 10:02 AM
To: LeDoux, Karen E BG RES 94TH DIV FS CMDGRP; (b) (6) USAR 80TH TNG CMD
Cc: (b) (6) @aol.com; (b) (6) @aol.com; (b) (6) USAR 80TH TNG CMD
Subject: RE: Policy comments (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

Ma'am/COL Higginbotham,

A draft counseling statement for (b) (6) is attached. Please review and let me know if you have any comments, suggestions, or corrections.

Thanks,

(b) (6)

-----Original Message-----
From: LeDoux, Karen E BG RES 94TH DIV FS CMDGRP
Sent: Sunday, May 22, 2011 12:15 PM
To: (b) (6) AGR 80TH TNG CMD SJA; (b) (6) USAR 80TH TNG CMD
Cc: (b) (6) @aol.com; (b) (6) USAR 80TH TNG CMD
Subject: Re: Policy comments (UNCLASSIFIED)

Are you going to consolidate all comments into a counseling stmt?

Thx,
BG LeDoux

----- Original Message -----
From: (b) (6) AGR 80TH TNG CMD SJA
Sent: Wednesday, May 18, 2011 01:13 PM
To: LeDoux, Karen E BG RES 94TH DIV FS CMDGRP; (b) (6) USAR 80TH TNG CMD
Cc: (b) (6) @aol.com; (b) (6) @aol.com; (b) (6) USAR 80TH TNG CMD
Subject: FW: Policy comments (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

Ma'am,

Attached are the suggestions received from USARC.

Thanks,

(b) (6)

-----Original Message-----

From: (b) (6) USAR USARC SJA

Sent: Wednesday, May 18, 2011 10:55 AM

To: (b) (6) AGR 80TH TNG CMD SJA

Cc: (b) (6) @aol.com'; (b) (6) USAR 80TH TNG CMD; (b) (6) USAR USARC

SJA; (b) (6) USAR USARC SJA; (b) (6) USAR USARC SJA

Subject: RE: Policy comments (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: FOUO

(b) (6)

Sorry for the delay in reply - I've been out on leave.

(b) (5)

2-207. Disclaimer for Speeches and Writings Devoted to Agency Matters. A DoD employee who uses or permits the use of his military grade or who includes or permits the inclusion of his title or position as one of several biographical details given to identify himself in connection with teaching, speaking or writing, in accordance with 5 C.F.R. 2635.807(b) (reference (a)) in subsection 2-100 of this Regulation, shall make a disclaimer if the subject of the teaching, speaking or writing deals in significant part with any ongoing or announced policy, program or operation of the DoD employee's Agency, as defined in subsection 2-201 of this Regulation, above, and the DoD employee has not been authorized by appropriate Agency authority to present that material as the Agency's position. The disclaimer shall be made as follows:

a. The required disclaimer shall expressly state that the views presented are those of the speaker or author and do not necessarily represent the views of DoD or its Components;

b. Where a disclaimer is required for an article, book or other writing, the disclaimer shall be printed in a reasonably prominent position in the writing itself;

c. Where a disclaimer is required for a speech or other oral presentation, the disclaimer may be given orally provided it is given at the beginning of the oral presentation.

(b) (5), (b) (6)

V/R:

(b) (6)

Attorney Advisor
US Army Reserve Command

(b) (6)

8/23/2019

000003

Please complete our client satisfaction survey:
<https://www.jagcnet.army.mil/surveys/USARCCSS>.

-----Original Message-----

From: (b) (6) AGR 80TH TNG CMD SJA
Sent: Thursday, May 12, 2011 2:41 PM
To: (b) (6) USAR USARC SJA
Cc: (b) (6) @aol.com; (b) (6) USAR 80TH TNG CMD
Subject: FW: Policy comments (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

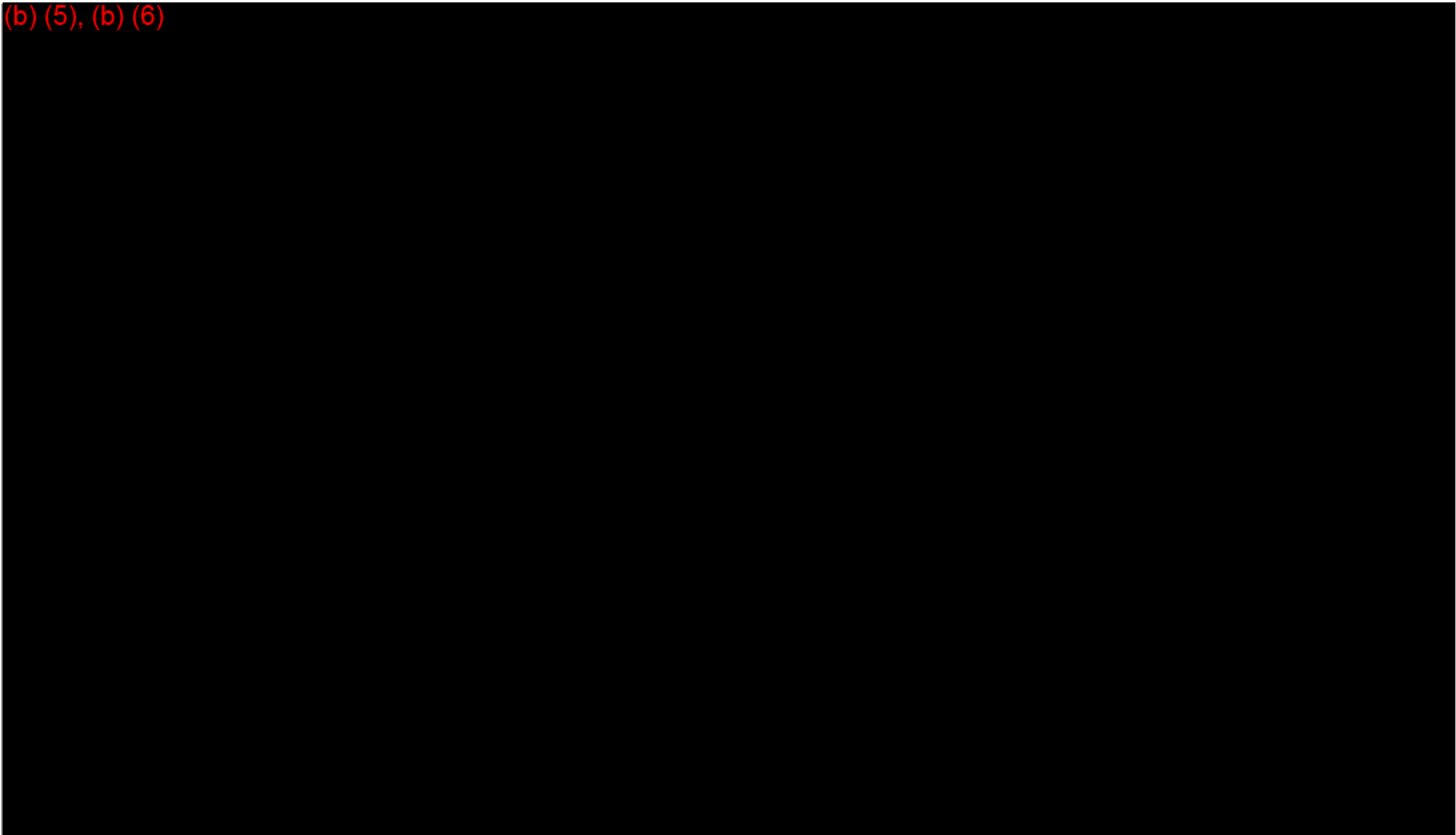
(b) (5)



-----Original Message-----

From: Ledoux, Karen E BG RES USAR USARC [mailto:karen.ledoux@us.army.mil]
Sent: Wednesday, May 11, 2011 11:25 AM
To: (b) (6) AGR 80TH TNG CMD SJA
Cc: (b) (6) USAR 80TH TNG CMD
Subject: Policy comments

(b) (5), (b) (6)



(b) (5)

Thank you,

BG Karen LeDoux
Commander
94th Division (Force Sustainment)
Gerow U.S. Army Reserve Center
2501 Mahone Ave, Bldg 12402
Ft Lee, Virginia 23801-6060

karen.ledoux@mail.us.army.mil

c: (b) (6)

h: (b) (6)

<https://www.us.army.mil/suite/page/627174>

UNCLASSIFIED

FOUO

Classification: UNCLASSIFIED

Caveats: NONE

Classification: UNCLASSIFIED

Caveats: FOUO

Classification: UNCLASSIFIED

Caveats: FOUO

Classification: UNCLASSIFIED

Caveats: FOUO

(b) (6)

AGR 80TH TNG CMD SJA

From: (b) (6) AGR 80TH TNG CMD SJA
Sent: Monday, June 06, 2011 3:55 PM
To: (b) (6) USAR 80TH TNG CMD
Cc: LeDoux, Karen E BG RES 94TH DIV FS CMDGRP; (b) (6) @us.army.mil; (b) (6)
(b) (6) USAR 80TH TNG CMD
Subject: (b) (6) counseling (UNCLASSIFIED)
Attachments: (b) (6) xfdl
Signed By: (b) (6) @us.army.mil


Classification: UNCLASSIFIED

Caveats: NONE

(b) (5), (b) (6)



(b) (5), (b) (6)



Thanks,

(b) (6)



Classification: UNCLASSIFIED

Caveats: NONE

DEVELOPMENTAL COUNSELING FORM

For use of this form, see FM 6-22; the proponent agency is TRADOC

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: 5 USC 301, Departmental Regulations; 10 USC 3013, Secretary of the Army and E.O. 9397 (SSN)
PRINCIPAL PURPOSE: To assist leaders in conducting and recording counseling data pertaining to subordinates.
ROUTINE USES: For subordinate leader development IAW FM 6-22. Leaders should use this form as necessary.
DISCLOSURE: Disclosure is voluntary.

PART I - ADMINISTRATIVE DATA

Name (Last, First, MI) (b) (6)	Rank/Grade (b) (6)	Social Security No. (b) (6)	Date of Counseling
Organization HHC, 94TH DIVISION (FS), FORT LEE, VA		Name and Title of Counselor (b) (6) Assistant Division Commander	

PART II - BACKGROUND INFORMATION

Purpose of Counseling: (Leader states the reason for the counseling, e.g. Performance/Professional or Event-Oriented counseling, and includes the leader's facts and observations prior to the counseling.)

(b) (6), (b) (5)

PART III - SUMMARY OF COUNSELING

Complete this section during or immediately subsequent to counseling.

Key Points of Discussion:

(b) (6), (b) (5)

OTHER INSTRUCTIONS

This form will be destroyed upon: reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement. For separation requirements and notification of loss of benefits/consequences see local directives and AR 635-200.

Plan of Action (Outlines actions that the subordinate will do after the counseling session to reach the agreed upon goal(s). The actions must be specific enough to modify or maintain the subordinate's behavior and include a specified time line for implementation and assessment (Part IV below).)

(b) (6), (b) (5)

Session Closing: (The leader summarizes the key points of the session and checks if the subordinate understands the plan of action. The subordinate agrees/disagrees and provides remarks if appropriate.)

Individual counseled: ☐ I agree ☐ disagree with the information above.

Individual counseled remarks:

Signature of Individual Counseled: _____

Date: _____

Leader Responsibilities: (Leader's responsibilities in implementing the plan of action.)

Signature of Counselor: _____

Date: _____

PART IV - ASSESSMENT OF THE PLAN OF ACTION

Assessment: (Did the plan of action achieve the desired results? This section is completed by both the leader and the individual counseled and provides useful information for follow-up counseling.)

Counselor: _____

Individual Counseled: _____

Date of Assessment: _____

Note: Both the counselor and the individual counseled should retain a record of the counseling.



DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
FORT EUSTIS TEAM, MID-ATLANTIC REGION
154th LEGAL SUPPORT ORGANIZATION
6901 TELEGRAPH ROAD
ALEXANDRIA, VIRGINIA 22310



REPLY TO
ATTENTION OF:

ARRC-CAR-LSO-LT (15-6)

03 June 2011

MEMORANDUM FOR Commander, HHC, 94TH DIVISION (FS), General Leonard T. Gerow U.S. Army Reserve Center, 2501 Mahone Avenue, Fort Lee, Virginia 23801-6060 (ATTN: COL James H. Higginbotham, Assistant Division Commander)

SUBJECT: (b) (6) Proposed Counseling Statement

1. As the command is aware, (b) (6) is the subject of an ongoing investigation conducted UP AR 15-6. Please be advised that military counsel was appointed to represent (b) (6) in this matter, and or any matters incidental thereto. (b) (6) is also represented by civilian counsel, (b) (6), Esq.
2. (b) (6) has advised his legal defense team that on 04 June 2011 the command intends to serve him with a counseling statement respecting his duties and obligations pursuant to DoD Directive 5230.09, DoD Instruction 5230.29, and DoD 5500.7-R, sec. 2-207. In anticipation of this action, the undersigned submits that (b) (6) understands the regulations that govern his conduct while in uniform and/or in a Title 10 status. This does not suggest, however, that (b) (6) concurs with the matters set out in the proposed counseling statement, particularly as they relate to him, directly or implicitly, in his private capacity. Moreover, the terms of the counseling statement appear to direct that (b) (6) undertake actions that are wholly outside of his control. We suggest these types of directives are unreasonable and potentially in violation of (b) (6) constitutional rights.
3. Due to what appears to be the extraordinary breath of the ongoing AR 15-6 investigation, together with the potential implications or purpose of the proposed counseling statement, please note that (b) (6) hereby exercises and asserts his rights UP Article 31, UCMJ, the 1st, 4th, 5th and 6th Amendments to the Constitution of the United States. Accordingly, the undersigned, on behalf of (b) (6) requests that all matters related to (b) (6) of a potentially adverse nature, including proposed counseling statements or any verbal or written communication, be directed through his appointed military and civilian counsel. This extends to the particular counseling statement the command proposes to present (b) (6) on 4 June 2011.
4. Please also be advised that, in full exercise of his rights, (b) (6) will not sign any documentation presented to him that is of a potentially adverse nature, or that can be used against him in any adverse proceedings. If appropriate, however, (b) (6) will respond to any and all proposed counseling statement or queries via his appointed or civilian counsel.

ARRC-CAR-LSO-LT

SUBJECT: (b) (6) Counseling Statement

5. Finally, the undersigned also request that the command refrain from engaging (b) (6) directly in any discussions/communications of a potentially adverse nature. In the event the command believes they must address (b) (6) directly, he hereby asserts his 6th Amendment/Art 31 rights to have counsel present.

6. POC is the undersigned, tel. 571-331-5565; email: (b) (6)@aol.com.

(b) (6) (b) (6)
Respectfully submitted,

(b) (6)

(b) (6)

(b) (6) JA, USAR
Defense Counsel

(b) (6)

(b) (6) JA, USAR
Senior Defense Counsel

(b) (6)

P.C.

1250 Connecticut Ave., N.W.
Suite 200
Washington, D.C. 20036
Civilian Defense Counsel

CERTIFICATE OF SERVICE

I CERTIFY THAT A COPY OF THIS memorandum was served on 03 June 2011 via electronic mail on 03 June 2011 c/o 94th Division (Force Sustainment), General Leonard T. Gerow U.S. Army Reserve Center, 2501 Mahone Avenue, Fort Lee, Virginia 23801-6060.

(b) (6)

(b) (6) (b) (6)

(b) (6) JA, USAR

(b) (6) AGR 80TH TNG CMD SJA

From: (b) (6) AGR 80TH TNG CMD SJA
Sent: Monday, June 06, 2011 3:57 PM
To: (b) (6) USAR USARC SJA
Cc: (b) (6) USAR USARC SJA; (b) (6) USAR USARC SJA; (b) (6) USAR USARC SJA; (b) (6) USAR 80TH TNG CMD
Subject: RE: (b) (6) proposed counseling statement and TDS response (UNCLASSIFIED)
Signed By: (b) (6) @us.army.mil

Classification: UNCLASSIFIED
Caveats: FOUO

(b) (6)

Thank you for the guidance and assistance in this matter.

(b) (6)

-----Original Message-----

From: (b) (6) USAR USARC SJA
Sent: Monday, June 06, 2011 2:31 PM
To: (b) (6) AGR 80TH TNG CMD SJA
Cc: (b) (6) USAR USARC SJA; (b) (6) USAR USARC SJA; (b) (6) USAR USARC SJA; (b) (6) USAR 80TH TNG CMD
Subject: RE: (b) (6) proposed counseling statement and TDS response (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

(b) (6) -

Here are my comments regarding the proposed counseling statement:

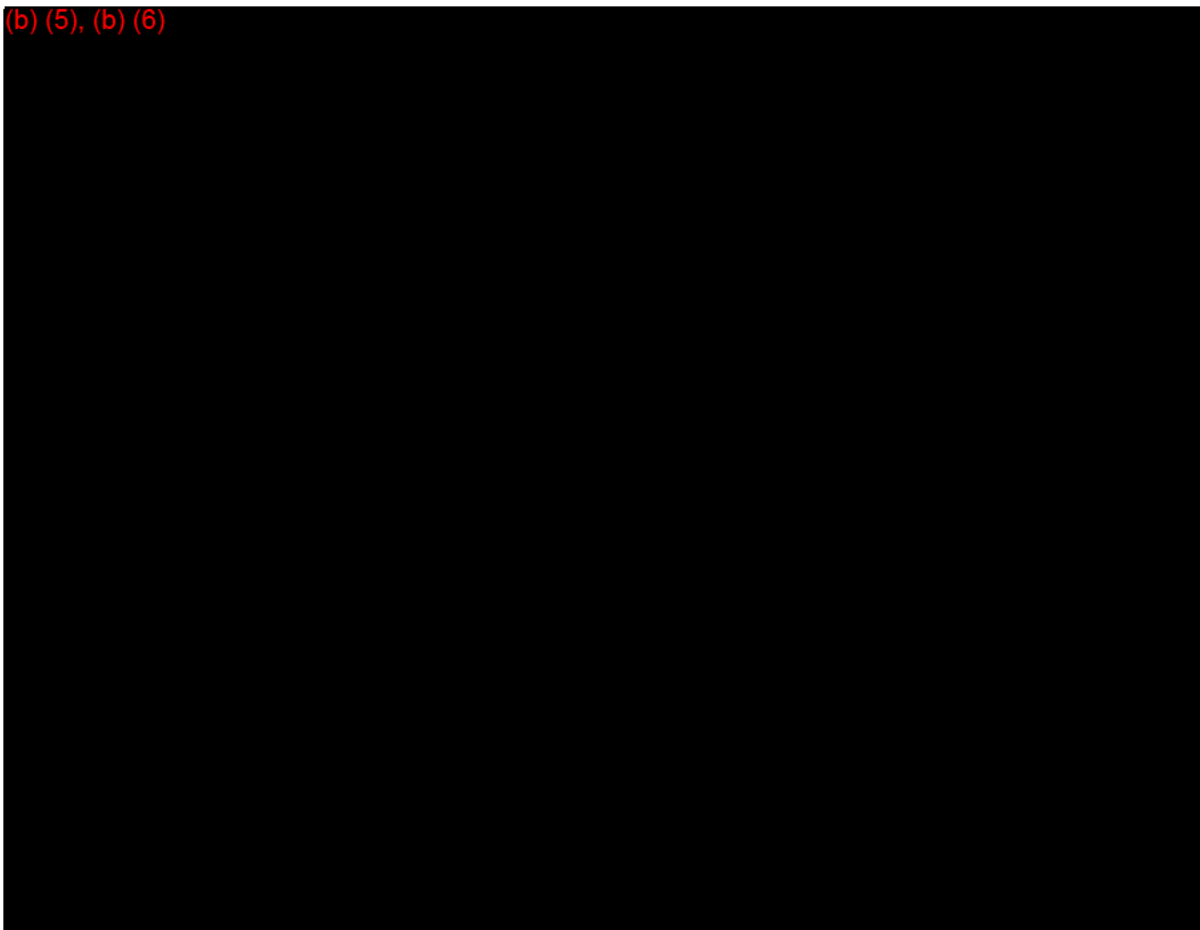
(b) (5)

(b) (5)

(b) (5)

With regard to the defense counsel letter:

(b) (5), (b) (6)



V/R:

(b) (6)

Attorney Advisor
US Army Reserve Command

(b) (6)

Please complete our client satisfaction survey:
<https://www.jagcnet.army.mil/surveys/USARCCSS>.

-----Original Message-----

From: (b) (6) AGR 80TH TNG CMD SJA

Sent: Monday, June 06, 2011 12:30 PM

To: (b) (6) USAR USARC SJA

Cc: LeDoux, Karen E BG RES 94TH DIV FS CMDGRP; (b) (6) @us.army.mil;

(b) (6) USAR 80TH TNG CMD; (b) (6) USAR 80TH

TNG CMD

Subject: (b) (6) proposed counseling statement and TDS response
(UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

(b) (6)

Attached is the proposed counseling statement for (b) (6) and a response from (b) (6) Defense Counsel team. Please review and advise. Thanks in advance for your assistance in this matter.

8/23/2019

000013

(b) (6)

Classification: UNCLASSIFIED
Caveats: NONE

Classification: UNCLASSIFIED
Caveats: FOUO

Classification: UNCLASSIFIED
Caveats: FOUO

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OPERATION DARK HEART: SPY CRAFT AND SPECIAL OPS ON THE FRONT LINES OF AFGHANISTAN

Thursday, May 12
6:30PM

**"TONY IS, IN ALL RESPECTS, THE REAL
JACK BAUER—BUT WITH AN INTELLECT."**

**—DR. CHRIS LEHMAN, SPECIAL ASSISTANT TO PRESIDENT REAGAN,
NATIONAL SECURITY COUNCIL**



In 2001, just after the 9/11 attacks, **Lt. Col. Tony Shaffer**, a DIA senior intelligence officer, returned to active duty for a 30-month period, during which he commanded a DIA operating base and had two successful undercover combat tours to Afghanistan. During these tours he participated in the search for senior Al Qaeda leadership in Afghanistan. In recognition of his successful high risk/high gain operations Shaffer received the Bronze Star Medal for his performance as an operations officer.

He wrote about his experiences in *Operation Dark Heart*. This unprecedented look at intelligence operations during a period in the war where a small number of operators were able to effectively control this large country caused a firestorm when it was published in September 2010. Although cleared by Army censors, the DIA subsequently claimed that many passages in the book were classified and that their release compromised national security. In an extraordinary step, the government bought and shredded over 9,000 copies and insisted that the book be heavily redacted when republished. Join Shaffer to hear about his experiences in Afghanistan, his thoughts about the current situation there, and his comments on the *Operation Dark Heart* controversy.

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NOTHING IS WHAT IT SEEMS



8/23/2019

000017

- E. Ethical matters involving Reserve component (RC) personnel include:
1. Identification and prevention of actual and apparent conflicts of financial interest, both individual and organizational.
 2. Filing financial disclosure reports
 3. Outside (off-duty) employment and off-duty business activities by mobilized reservists.
 4. Whether reservists can continue to hold civil offices.
 5. Supplementation of salary.
 6. Post-Government employment restrictions.
 7. Wartime gifts.
- F. Commanders have an affirmative obligation under the JER § 5-408 to refrain from assigning reservists to perform duties that could enable them to obtain non-public information or gain unfair advantage over competitors, or which present an actual or apparent conflict of interest.
1. Commanders **must** screen reservists to ensure that no actual or apparent conflict exists between their private interests and their duty assignment.
 2. Reservists have an affirmative obligation to disclose material facts in this regard. However, receiving commands cannot assume compliance and must independently screen incoming personnel to avoid conflicts of interest.
 3. Screening document should elicit (at minimum) the following information:
 - a. Civilian employer of the reservist, location, job title, phone number;

5th Ethics Counselor's Course
The Judge Advocate General's Legal Center and School

- G. "Telling their story" -- 5 C.F.R. § 2635.807 prohibits the acceptance of compensation for teaching, speaking, or writing when:
- a. The activity is undertaken as part of the employee's official duties;
 - b. The invitation was extended because of the employee's official position rather than his/her expertise;
 - c. The invitation is from a person whose interest may be affected by the employee's official duties;
 - d. The presentation is based on nonpublic information;
 - e. The topic deals with the employee's current duties or those during the previous year; or
 - f. The topic deals with a policy, program, or operation of the employee's agency.
2. Rationale: prevent an employee from selling to others what the Government already pays him/her to do.
3. "Compensation" includes all payments, including royalties, meals, but excludes gifts that could be accepted from prohibited sources and free attendance at the event in which the speaking or teaching takes place.
4. Does not preclude matters within the employee's discipline or expertise based on education or experience.
5. Does not preclude teaching certain courses, e.g., multiple presentation course as part of a regularly established curriculum.
6. Policy & Security Reviews: A lecture, speech, or writing that pertains to military matters, national security issues, or subjects of significant DOD concern shall be reviewed for clearance by appropriate security and public affairs offices. JER § 3-307

5th Ethics Counselor's Course
The Judge Advocate General's Legal Center and School

Commandant of the Marine Corps
Headquarters, U.S. Marine Corps (Code JAR)
Washington, DC 20380-3000
Telephone 703-614-1513

c. Air Force
HQ AFPC/DPPRSP, 550 C Street West
Randolph AFB, Texas, 78150-4739
Telephone 210-565-2461

d. Army
Commander, U.S. Army Reserve Personnel Center
ATTN: ARPC-SFR-SC
9700 Page Boulevard
St. Louis, MO 63132-5200
Telephone 314-538-5090

- B. Employment by a Foreign Principal. Federal employees may not act as agents for foreign principals required to register under the Federal Agents Registration Act of 1938 (2 U.S.C. §§ 611 et seq.) or as agents for lobbyists required to register under the Lobbying Disclosure Act of 1995 in connection with the representation of a foreign entity (2 U.S.C. § 1603). 18 U.S.C. § 219. *See* <http://www.usdoj.gov/criminal/fara/index.html>.

VI. MISUSE OF POSITION

- A. Use of Nonpublic Information. Employees may not use nonpublic information to further their own private interests or those of another. 5 C.F.R. § 2635.703.
1. Nonpublic information is information that is not available to the general public. It includes information not releasable under FOIA, protected by Privacy Act, classified (18 U.S.C. § 798, 50 U.S.C. § 783(b)), protected by the procurement integrity law (41 U.S.C. § 423), or protected by the Trade Secrets Act (18 U.S.C. § 1905).
 2. Assignment of Reservists. Commanders have affirmative obligations to guard against assigning Reservists duties that may enable them to obtain information and gain unfair advantage over competitors. Reservists must disclose information necessary to ensure that no conflicts exist between their duty assignment and private interests. JER § 5-408.

- B. Use of Government property. See Chapter E on Use of Government Resources for detail. Employees may only use Government property for authorized purposes. "Authorized purposes" include "those purposes authorized in accordance with law or regulation." 5 C.F.R. § 2635.704. Employees may be permitted to use certain types of government property (such as typewriters, calculators, libraries and similar resources) for other than official purposes if the agency designee determines that:
1. The use would not adversely affect the performance of official duties;
 2. The use is of reasonable duration and frequency, and made only during personal time;
 3. The use serves a legitimate public interest;
 4. The use does not put Government resources to uses that would reflect adversely on DoD; and
 5. The use creates no significant additional cost to DoD [JER 2-301b].
- C. Endorsements. Employees may not use or permit the use of their Government positions, titles, or authority in a manner that could be reasonably construed to imply official endorsement or sanction of personal activities or non-Federal entities. 5 C.F.R. § 2635.702; JER § 3-209.
1. Specific authority exists to endorse some types of organizations like the military relief societies. JER § 3-210a.
 2. Rank and branch of service are considered terms of address and do not imply official endorsement. ("Pvt. J. Jones, U.S. Army"). [JER 3-300a(1)].

3. Military personnel may not wear the uniform in connection with furthering political activities, private employment, or commercial interests or when participating in activities such as unofficial public speeches, when Service sponsorship or sanction may be implied. DoD Instruction 1334.01. Air Force Instruction 36-2903, 2 Aug 06, Table 1.3. Other commercial use of DoD material, including uniforms and insignia, must be approved by OASD (PA). Permission to use or reproduce military emblems or insignia for unofficial purposes other than commercial advertising or promotion may only be given by the Military Department responsible for the insignia. DoD Instruction 5410.20.
- D. Use of Military Title by Retirees and Reservists. Retired military members and Reservists, not on active duty, may use their military titles in connection with commercial enterprises provided they indicate their retired or inactive Reserve status. They may not use military titles to discredit DoD or give the appearance of official DoD sponsorship. JER § 2-304.
- E. Solicited Sales. DoD employees shall not make solicited sales to DoD personnel who are junior in rank, grade, or position, or to the family members of such personnel. JER §§ 2-205, 5-409.
 1. Includes solicited sales of insurance, stock, mutual funds, real estate, cosmetics, vitamins, or house wares.
 2. Does not prohibit sale or lease of employee's non-commercial property.
 3. Does not prohibit commercial sales solicited and made in a retail establishment during off-duty time.
 4. Absent coercion or intimidation, sales made because the junior approaches the senior are not prohibited.

3. Non-Compete. Prior to 1999, 10 U.S.C. § 974 placed restrictions on active-duty enlisted members engaging in compensated outside employment when it interfered with employment of local civilians. Nevertheless, 10 U.S.C. § 974 was repealed in the National Defense Authorization Act of FY99 (P.L. 105-261). There are still restrictions on military band members of all services regarding the degree to which they may compete against off-base, civilian musicians. 10 U.S.C. §§ 3634, 6223, 8634; JER § 3-304.
- B. Criminal Conflicts of Interest. Employees may not act as agent or attorney for anyone before any agency of the Government on any matter in which the United States is a party or has a direct and substantial interest. 18 U.S.C. § 205. Other than in the performance of official duties, employees may not receive compensation for representational services rendered either personally or by another. 18 U.S.C. § 203. See Chapter C on Conflicts of Interest for details.
- C. Honoraria. An honorarium is payment to an individual in recognition of a special service for which custom or propriety forbids any fixed price to be set. Honoraria services may include, but are not limited to, speeches, panel participation, reviewing manuscripts, and leading group discussions. The ban on accepting honoraria set out in 5 C.F.R. Part 2636, subpart B (*now deleted*), was struck down by the Supreme Court in *National Treasury Employees Union v. United States*, 115 S. Ct. 1003 (1995). The Office of Legal Counsel, Department of Justice, issued an opinion on February 26, 1996, that the honoraria prohibition cannot be enforced against any Government employee.
- D. Teaching, Speaking, or Writing Related to Official Duties
 1. A Government employee may not use his public office for private gain. Reflecting this restriction is 5 C.F.R. § 2635.807, which precludes the acceptance of compensation from a non-Federal source for teaching, speaking, or writing when:
 - a. The activity is undertaken as part of the employee's official duties; or
 - b. The invitation was extended because of the employee's official position rather than his expertise; or
 - c. The invitation is from a person whose interest may be affected by the employee's official duties; or

- d. The presentation is based on nonpublic information; or
 - e. The topic deals with the employee's current duties or those during the previous year, or the topic deals with a policy, program, or operation of the employee's agency.
- 2. "Compensation" is defined at 5 CFR 2635.807(a)(2)(iii). It does not include gifts that could be accepted from prohibited sources under 5 C.F.R. § 2635.204, free attendance at the event in which the speaking or teaching takes place, or publications that provide a record of the activity. When an employee who is required to file a financial disclosure report is authorized to and does accept travel expenses from a source other than the United States Government, travel and travel reimbursements must be reported on the financial disclosure report. 5 C.F.R. § 2635.807(a)(2)(iii).
 - 3. The prohibition on accepting compensation does not apply to matters within the employee's discipline or expertise based on education or experience. 5 C.F.R. § 2635.807(a)(2)(i)(E) note. It applies differently to non-career employees and special government employees than it does to other Executive Branch employees.
 - 4. As an exception, an employee may accept compensation for teaching a course of the regularly established curriculum of an elementary school, high school, or institution of higher education. 5 C.F.R. § 2635.807(a)(3).
 - 5. Disclaimers. DoD employees who permit the use of their military grade, title, or position while teaching, speaking, or writing regarding DoD policies, programs, or operations shall indicate that the views are those of the speaker and not DoD or its components. Where a disclaimer is required for a writing, the disclaimer must be prominently printed in the presentation. Where a disclaimer is required for a speech, the disclaimer may be given orally at the beginning of the presentation. JER § 2-207.
 - 6. Policy & Security Reviews. A lecture, speech, or writing that pertains to military matters, national security issues, or subjects of significant DoD concern shall be reviewed for clearance by appropriate security and public affairs offices. JER § 3-307; Secretary of the Navy Instruction 5720.44B, Department of the Navy Public Affairs Policy and Regulations, 1 Nov 05, Chapter 2; Air Force Instruction 35-101, Public Affairs Policies and Procedures, 29 Nov 05, Chapter 15.

E. Expert Witness. Employees may not appear as expert witnesses, other than on behalf of the United States, in any proceeding before a Federal agency or court in which the United States is a party or has a direct and substantial interest. 5 C.F.R. § 2635.805.

1. An employee may testify without compensation with DAEO approval.
2. The prohibition does not apply to fact witnesses when subpoenaed by appropriate authority.

F. Outside earned income limitation for covered non-career employees. 5 U.S.C. Appx. §§ 501, 502; 5 C.F.R. 2636, subpart C.

1. "Covered non-career employees" include non-career employees whose basic pay equals lowest level of SES. Does not include career SES, admirals, or generals. 5 C.F.R. § 2636.303.
2. Limits annual outside earned income to 15% of Executive Level II (\$25,200 in 2007). 5 C.F.R. § 2636.304.
3. No outside earned income for Presidential appointees. Executive Order 12674 as modified by Executive Order 12731.
4. No compensation from activities involving a fiduciary relationship (e.g., outside law practice). 5 C.F.R. § 2636.305.
5. No compensation for serving as officer or member of the board of directors of any entity. 5 C.F.R. § 2636.306.
6. DAEO authorization required for compensation for teaching. 5 C.F.R. § 2636.307.

Chapter 4 Eliminations

Section I Scope

4-1. Overview

a. An officer is permitted to serve in the Army because of the special trust and confidence the President and the nation have placed in the officer's patriotism, valor, fidelity, and competence. An officer is expected to display responsibility commensurate to this special trust and confidence and to act with the highest integrity at all times. However, an officer who will not or can not maintain those standards will be separated.

b. Every officer deserves a fair chance to demonstrate their capabilities. When an officer shows ineffective tendencies (especially if the officer is inexperienced) when practicable, they will be given another chance under another commander. The officer's ineffectiveness will be systematically recorded in documents that specify each period covered, duties observed, and defects noted. Recommendations for elimination action will not be based on generalities and vague impressions. It is necessary to document, in writing, the precise reasons an officer is considered ineffective.

c. A U.S. Army Reserve or Army National Guard officer must hold, or be capable of holding, a security clearance of at least secret. An Active Army officer must hold a security clearance of at least secret. This requirement may not be waived. The final denial or revocation of an officer's Secret security clearance by appropriate authorities acting pursuant to DODD 5200.2-R and AR 380-67 requires the discharge of that officer from the service." An officer whose security clearance has been withdrawn or withheld due to unfavorable information regarding loyalty, subversion, or security violations may be processed for involuntary separation under AR 380-67, paragraph 8-201.2. In accordance with AR 380-67, paragraph 8-103, however, the officer should first be considered for discharge under this regulation. The administrative procedures prescribed in AR 380-67, chapter 8, will be followed until the case is referred to HRC-Alexandria (AHRC-OPD-A).

d. Commanders will counsel and review all separation actions in accordance with paragraph 1-34(a)(b) of this regulation

e. This chapter prescribes the tasks, rules, and steps for eliminating officers in the Active Army for substandard performance of duty, misconduct, moral or professional dereliction, and in the interests of national security.

4-2. Reasons for elimination

While not all inclusive, when one of the following or similar conditions exist, elimination action may be or will be initiated as indicated below for—

a. Substandard performance of duty.

(1) A downward trend in overall performance resulting in an unacceptable record of efficiency, or a consistent record of mediocre service.

(2) Failure to keep pace or to progress with contemporaries, as demonstrated by a low record of efficiency when compared with other officers of the same grade and competitive category.

(3) Failure to exercise necessary leadership or command expected of an officer of their grade.

(4) Failure of an officer to absorb technical proficiency required for grade and competitive category.

(5) Failure to properly perform assignments commensurate with an officer's grade and experience.

(6) Apathy, defective attitudes, or other characteristic disorders to include inability or unwillingness to expend effort.

(7) Failure to respond to alcohol or drug problem rehabilitation efforts in a reasonable length of time. (See AR 600-85 for further explanation.) Elimination action will be initiated. Care should be taken to avoid the inclusion of limited-use evidence, as defined in AR 600-85, chapter 6.

(8) Failure to conform to prescribed standards of dress, personal appearance, or military deportment.

(9) Failure to achieve satisfactory progress after enrollment in the Army weight control program or failure to maintain the weight/body fat standards established under the provisions of AR 600-9 after removal from an established weight control program. Elimination action will be initiated. This provision does not include those judge advocates and AMEDD officers who have incurred a statutory ADSO for participating in Army sponsored education and training programs such as the Funded Legal Education Program (10 USC 2004), Armed Forces Health Professions Scholarship Program, or the Uniform Services University of the Health Sciences (10 USC, chapters 104, 105).

(10) When no medical problems exist, and an officer has two consecutive failures of the APFT, elimination action will be initiated. This provision does not include those judge advocates and AMEDD officers who have incurred a statutory ADSO for participating in Army sponsored education and training programs such as the Funded Legal

Personnel Office (CPO), to be filed in the individual's Official Personnel File (OPF). The form will be filed on the permanent side of the OPF as an adjunct to the DA Form 873. NDAs for civilian employees transferring from one duty station to another, to include transferring to another U.S. Government agency, will transfer as part of their OPF. The NDA will not be removed from the OPF. If a command receives an NDA executed by a current employee while that employee was assigned to another command or agency, the command official receiving the form will forward the NDA to the applicable local or regional supporting CPO for insertion into the OPF as an adjunct to the DA Form 873. When a civilian employee transfers from one duty station to another, the designated command civilian personnel official will ensure that the Standard Form 75 (Request for Preliminary Employment Data) verifies that a completed NDA is on file. These forms, that are maintained in the individual's official personnel folder, will apply the disposition instructions for the official personnel folder.

b. Military Personnel. For military personnel, a copy of the NDA will be kept on file by the command security manager, or other designated command official, for verification that the individual has executed the NDA. Copies of nondisclosure agreements, such as SF 312 or SF 189 or similar forms, signed by military personnel, with access to information that is classified under standards put forth by Executive Orders governing security classification, should be maintained separately from personnel security clearance files. This copy will remain in the command file until the individual transfers or is separated from the U.S. Army. Upon the soldier's arrival at the new duty station, the command security manager will maintain a copy of the original, newly signed NDA on file pending the next transfer. The accepting official will forward the original NDA to the address below, where it will be converted to microfiche and filed with the soldier's official records. Upon notification of transfer, the command security manager, or other designated command official, will send the copy of the NDA to the gaining organization's command security manager either by mail or in the possession of the transferring individual.

(1) Active Army Commissioned and Warrant Officers: Commander, U.S. Total Army Personnel Command, ATTN: TAPC-MSR Alexandria, VA 22332-0400.

(2) Active Army Enlisted Personnel: Commander, U.S. Army Enlisted Records and Evaluation Center, ATTN: PCRE-FS, 8899 East 56th Street, Fort Benjamin Harrison, IN 46249-5301.

(3) Reservists: Commander, U.S. Army Reserve Personnel Center, ATTN: DARP-PRD-MP, 9700 Page Avenue, St. Louis, MO 63132-5200. When a cleared Individual Ready Reserve (IRR) member is ordered to active duty for training that will involve access to classified information and previous execution of the NDA cannot be verified, an NDA will be completed at the training site and the original forwarded to the U.S. Army Reserve Personnel Center.

(4) National Guard Commissioned and Warrant Officers: Army National Guard Personnel Division, ATTN: NGB-ARD-C, 111 South George Mason Drive, Arlington, VA 22204-1382.

(5) For National Guard enlisted soldiers: Forward to the soldier's State Adjutant General, ATTN: POMSO.

c. Department of the Army Consultants and Other Non-U.S. Government Personnel. If a consultant to the Department of the Army is hired under Civil Service procedures, as opposed to contracting with a company for consultant services, the NDA will be executed and filed with the DA Form 873. If the consultant's OPF is not retired, the command is obligated to retain the NDA for the required 50-year retention period. Consultant NDAs cannot be used by or transferred to another activity. They only authorize access to classified information under a specific agreement and an access termination form must be executed when the agreement has ceased or when classified access is no longer required, whichever occurs first. In special situations where non-U.S. Government uncleared personnel have been granted classified access to specific information in accordance with the policy established in AR 380-67, the NDA will be attached to the exception to policy memorandum or other appropriate written authorization which authorized the individual's access to classified information and will be retained in the command's files for 50 years.

6-4. Refusal to execute the NDA

If a person refuses to sign the NDA, the individual will be advised of the applicable portions of the NDA, SF 312. The individual will be given five calendar days to reconsider and will not be permitted access to classified information during that time. At the end of the five-day period, the individual will again be requested to sign the NDA. If at that point the individual still refuses to sign the NDA, their classified access, if it had been previously granted, will be formally suspended, the individual will not be permitted any access to classified information, the Department of the Army's Central Clearance Facility will be notified concerning clearance revocation or denial action, and the matter will be reported as required by AR 380-67.

6-5. Debriefing and termination of classified access

a. Classified information is not the personal possession of any DA personnel, regardless of rank, title, or position. Classified information will not be removed to nonofficial or unapproved locations, such as personal residences, upon the termination of employment or military service of any person, including the custodian of that material.

b. All DA personnel who are retiring, resigning, being discharged, or will no longer have access to classified information, will out-process through the command security manager's office or other designated command office. During this out-processing the individual will be informed that security clearance and access to classified information has terminated and that the individual still has an obligation to protect any knowledge they have of classified information. DA personnel will sign a debriefing statement during out-processing. The debriefing statement will either

be the NDA Security Debriefing Acknowledgement section of the SF 312, or DA Form 2962 (Security Termination Statement). The debriefing, as a minimum, will consist of informing the individual of the continuing obligation to protect classified information accessed, the admonition that discussion or other revelation of classified information to unauthorized persons is prohibited, provide instructions for reporting any unauthorized attempt to gain access to classified information, advise the individual of the prohibition against retaining classified material when leaving the command, and remind the individual of the potential civil and criminal penalties for failure to fulfill these continuing responsibilities. The same procedures will be followed for DA personnel still employed and still in service whose security clearance has been withdrawn, denied (after interim access was granted), or revoked either for cause or for administrative reasons due to lack of need for future access to classified information. In these cases both civilian and military DA personnel will execute the debriefing statement.

c. Unless exempted by the senior security official at the MACOM, security out-processing is required for all cleared personnel transferring to another DA command or to a Federal Government agency. Transfers will not require the execution of the type of debriefing statement described in subparagraph b, above. This does not preclude the command from requesting the transferring individual sign or initial a form or statement indicating, in substance, that the individual has been advised of the continuing responsibility to protect classified information and/or has completed the security out-processing. Personnel transferring will be briefed on the responsibilities stated in subparagraph b, above. Additionally, personnel transferring will be advised that classified information previously created, or in the custody of, the individual, including that gained while attending training or conferences, does not belong to the individual and does not transfer to the gaining command without appropriate approval by both the gaining and losing commands. Such approval will be based upon the losing command's assessment of the need-to-know for the information by the gaining command. Out-processing can also be used as a means to ensure that the appropriate command security officials are aware of the departure of personnel to ensure combinations and passwords are changed, keys are returned, accountable documents and property are under new custody, etc. Where out-processing is not required for transfers, the command will establish procedures to ensure that the command security manager is advised of such transfers.

d. For all DA military personnel, retiring, resigning, or separating from military service, the DA Form 2962, or the termination portion of the NDA, will be executed and maintained on file by the command security manager, or other designated command official, at the soldier's last duty station, for a period of two years, in accordance with AR 25-400-2.

e. All Army civilian personnel who are retiring or resigning from government service, must out-process through the activity's security office. The security official will debrief the civilian employee about the continuing obligation to protect the classified information accessed during government service. The civilian employee should sign a DA Form 2962 or the NDA Debriefing Acknowledgement, which will be retained by the activity. Signing the NDA Debriefing Acknowledgement is the individual's option upon final separation from the government service, however, the individual will be informed that security clearance and access to classified information has terminated and that the individual still has a legal obligation to protect classified information. The original NDA, for civilian employees, who retire or resign from government service, will remain in the employee's OPF and will be retired as part of the OPF. The NDA (SF 189 or SF 312) for civilian employees who retired or resigned prior to 1993 and are currently filed in an inactive file will be forwarded to: National Personnel Records Center, Civilian Personnel Records, 111 Winnebago Street, St. Louis, MO 63118.

f. Refusal to sign the DA Form 2962 or the termination portion of the NDA, SF 312, will be considered a lack of personal commitment to protect classified information. Personnel who refuse to sign a termination statement will not be granted further access to classified information and their security clearance may be revoked or denied in accordance with AR 380-67.

6-6. Communication and cooperation between command officials

Commanders will establish policy and procedures to ensure that other command officials and personnel advise the command security manager of any information affecting an individual's access to classified information. Personnel officials will make sure that transfer and recruitment documents, including vacancy announcements, indicate if a security clearance is required for the position.

6-7. Access to restricted data, formerly restricted data, and critical nuclear weapons design information

a. Access to RD (less CNWDI) and FRD by DA personnel, at Army facilities, will be under the same conditions as for all other classified information, based on the appropriate security clearance and access, need-to-know for the information, and in accordance with DODD 5210.2. See paragraph 6-17 for the requirement for DA certification to access classified information, including RD and FRD, held by Department of Energy (DOE) personnel and for classified visits to DOE certified facilities. Because of the sensitivity of nuclear information, the need-to-know criteria will be strictly enforced for all access to RD and FRD information.

b. Critical Nuclear Weapons Design Information (CNWDI) is a category of SECRET and TOP SECRET restricted data. Access to and dissemination of CNWDI is of particular concern to national security. Access to CNWDI will be limited to U.S. citizens with final TOP SECRET or SECRET, as appropriate to the information being accessed,

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